IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

MARVIN J. SONOSKY
2030 M Street, N.W.
Washington, D.C. 20036
Attorney for the Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

		Page
I.	Respondents disregard the last section of each Rosebud statute	2
II.	Allotments	3
III.	School Lands	4
IV.	General Allotment Act	6
V.	Operative language	8
VI.	Reserved land	9
VII.	The United States did not guarantee payment for opened lands not sold	10
VIII.	Subsequent legislation	11
IX.	Some of Respondents unsubstantiated statements statements	12
CONCLUSION		13

TABLE OF CITATIONS

Cases:

DeCoteau v. District County Court, 420 U.S. 425 (1975) . . . 1

Dodge v. Nakai, 298 F. Supp. 17 (D.C. Ariz. 1969) . . . 3b

Erlenbaugh v. United States, 409 U.S. 239 (1972) . . . 12

Mattz v. Arnett, 412 U.S. 481 (1973) . . . 2, 8

Minnesota v. Hitchcock, 185 U.S. 373 (1902) . . . 5, 6

Morton v. Ruiz, 415 U.S. 199 (1973) . . . 3b

Oliphant v. Suquamish Indian Tribe, No. 76-5729, October Term, 1976 . . . 3b

Seymour v. Superintendent, 368 U.S. 351 (1962) . . . 2

Tooahnippan v. Hickel, 397 U.S. 598 (1970) . . . 12

United States v. Kagama, 118 U.S. 375 (1886) . . . 13

Statutes:

Act of February 8, 1887, c. 119, 24 Stat. 388 . . . 7

Act of March 2, 1889, c. 405, sec. 21, 25 Stat. 888 . . . 8

Statutes, continued: Page

Act of August 15, 1894, c. 290, sec. 12, 28 Stat. 286 5

Act of March 3, 1901, c. 832, 31 Stat. 1058 6

Snyder Act (25 U.S.C. 13) 4b

Miscellaneous:

Federal Indian Law, (GPO 1958) 3b

45 Cong. Rec. 5471 (1910) 10

S. Rept. No. 68, 61st Cong., 2d Sess. (1910) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

Prior to the decision below, Indian tribes knew where they stood with respect to the status of their reservations. This Court had laid down the controlling principles. When a tribe sold its land to the United States for an agreed consideration, Indian title was extinguished, the land was restored to the public domain and the reservation terminated, even in the exceptional case where the Indians continued to hold allotments in the ceded area. *DeCoteau v. District County Court,* 420 U.S. 425 (1975). But where a tribe did not sell and the United

States did not buy, the reservation status was unaffected, even though the unallotted and unreserved land was opened for sale to settlers at prices fixed by Congress and the proceeds credited to the tribe. *Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962).

The respondents would obliterate the distinctions made by this Court, wipe out the rule of *Mattz* and *Seymour,* make the rule of *DeCoteau* exclusive and thus destroy the reservation status of three-fourths of Rosebud and of all or portions of at least 20 other reservations. (Tribe's opening brief, App. 14a.)

In no instance has a reservation been terminated unless Indian title to the land was first extinguished by cession, or by eminent domain, or unless Congress disestablished the reservation by explicit language of termination. Concededly, the Rosebud statutes are not exercises of eminent domain, and do not contain language of termination. The dispute is whether the court below correctly held that the three Rosebud statutes constituted sales and purchases so that Indian title was extinguished, the land was restored to the public domain, and the reservation status of the opened areas was terminated.

I.

Respondents disregard the last section of each Rosebud statute.

In a prolix brief (142 pages) that violates the spirit of the Court's Rule 40, the respondents search practically everywhere but the Rosebud statutes themselves for legislative intent in support of the proposition that the Tribe ceded and the United States bought and extinguished Indian title. But in their search, the respondents

avoid mention of the critical statutory language that contains the complete answer. That language appears in the last section of each of the three Rosebud statutes where Congress affirmatively declared that the United States was not buying the land, or guaranteeing to find purchasers, or agreeing to do anything but open the lands for sale and pay over the proceeds "only as received". (Pet. Br. 41-44.)

The respondents make no answer to the last section of each of the three Rosebud statutes. The respondents, as did the courts below, deal with the three statutes as if the last section of each had been omitted. But those last sections may not be ignored. They speak louder than any materials extrinsic to the statutes. They spell out in unmistakeably clear language that the Tribes never ceded, the United States never bought, there was no payment from the United States, Indian title was not extinguished, the land was not made part of the public domain, and therefore, *Seymour* and *Mattz,* not *DeCoteau,* control. No part of the Rosebud reservation was terminated.

II.

Allotments

The Rosebud 1907 Act directed that prior to opening the lands affected (Tripp County), the Secretary was to make lieu allotments anywhere within the reservation, including Tripp County, to those allotted Indians who wished to change allotments. In addition, the Secretary was to make new 160-acre allotments to each enrolled, unallotted child.[1] The legislative history establishes that

---

[1]The language appears in the first proviso of section 2 of the 1907 Act set out in the appendix to the Tribe's opening brief, p. 7a, reading in pertinent part as follows:

"* * *:*Provided,* That prior to the said proclamation the Secretary of the Interior, in his discretion,

[footnote continued]

the lieu allotment provision related to about 80 allottees who were dissatisfied with their allotments (Pet. Br. 48-49, 81); that the new allotments were for about 600 or 700 children who never had been allotted (Pet. Br. 49, fn. 50); and that all the allotments, lieu and new, could be made anywhere on the reservation, including the Tripp county area opened by the 1907 Act (Pet. Br. 48-51). The courts below ignored the provisions for the 600 or 700 new allotments. But the provision for new and lieu allotments in the very areas opened, cannot be reconciled with the "clear" intent required to terminate reservation status. (Pet. Br. 51-52.)

The respondents answer by ignoring the statutory language that interferes with their desired result. The respondents quote and rely on only that portion of the allotment language relating to the 80 lieu allotments, and, as did the courts below, make no mention of the language calling for allotments for the 600 or 700 unallotted children. (Resp. Br. 84-85.)

III.

School lands

The South Dakota Enabling Act granted to South Dakota out of the public lands, school sections 16 and 36, in each township, or where those sections had been

---

may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation, *and he shall also allot one hundred and sixty acres of land to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of the Sioux Tribe of Indians belonging on the Rosebud Reservation* * * *." (emphasis supplied)

The respondent omits the underscored language, as did the courts below. (See Pet. Br. 51-52; Resp. Br. 84.)

sold or disposed of, lands in lieu thereof. The grant expressly excluded land in Indian reservations, until Indian title was extinguished and the lands became part of the public domain. (Pet. Br. 56.)

Where the reservation lands were opened for sale with the proceeds credited to the tribe, the lands were not public lands and the general school land grant did not apply. *Minnesota v. Hitchcock*, 185 U.S. 373, 391-395 (1902), and cases cited in Pet. Br. 33-34.

In order to transfer the Rosebud school land to the State, the United States paid the Tribe $2.50 per acre for the school lands and extinguished Indian title. (Pet. Br. App. p. 6a, sec. 4; p. 9a, sec. 6; p. 13a, sec. 8.) The United States thus acquired title to the school lands. (Pet. Br. 30, fn. 36.) This is made plain in the last section of each of the three Rosebud Acts reciting that the United States was not purchasing any land except the school lands. (See pp. 2-3, *supra*.)[2] The Congressional debates that respondents emphasize, were concerned with whether the Government should donate school lands purchased with public funds. The debates were not concerned with reservation boundaries or jurisdiction. The legislative decision that the school lands should be donated was accomplished by placing specific language of grant in the Rosebud statutes.[3]

---

[2]The respondents point to three statutes preceding the 1904 Rosebud Act that were advanced during the debates as precedents for granting the school lands to South Dakota. (Resp. Br. 83-84.) In one instance the land was expressly "restored to the public domain" (Sioux 1889 Act, sec. 21). In the other two, Indian title was extinguished by outright purchase and sale (Sisseton and Wahpeton 1889 Act—*DeCoteau*); (Yankton Act of August 15, 1894, c. 290, sec. 12, 28 Stat. 286, 314). In the case of Rosebud also, the United States acquired title to the Rosebud school sections.

[3]The specific language also assured the State of South Dakota that it would get first choice and its full grant by permitting the State to satisfy its school grant before the land was opened for sale.

The courts below reasoned that since the general grant applied only where Indian title had been extinguished, the presence of the grant in the Rosebud Acts proved that Indian title to all of the opened land was extinguished. (Pet. Br. 57.) The courts should have come to the opposite conclusion. If the United States had not acquired the school sections and placed an explicit grant in each of the three Rosebud statutes, the school lands would not have passed to the State. *Minnesota v. Hitchcock,* 185 U.S. 373, 391-395 (1902). If the United States had extinguished Indian title to all of the land, the separate acquisitions of the school sections and the explicit grants to the State would not have been necessary. In the last section of each of the Rosebud statutes, Congress pointedly made clear that the United States was acquiring the school sections and no other land. (See pp. 2-3, *supra.*) This sustains the Tribe's position that there was no sale, or cession of the opened lands, and that by the terms of the statutes, Indian title was not extinguished to any land but the school lands.

IV.

General Allotment Act

The respondents pursue the utterly erroneous theme "that, like the *DeCoteau* Act, the Rosebud Acts were also initiated, negotiated and enacted pursuant to Section 5 of the General Allotment Act." (Resp. Br. 28.) The respondents would force parallels with *DeCoteau,* where none exist. (Resp. Br. 22-34.)

None of the three Rosebud statutes was negotiated by the Secretary pursuant to section 5, or any other section, of the General Allotment Act. The negotiations were pursuant to authority contained in the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1077. (Pet. Br. 5-6.) Neither section 5, nor any other section of the General Allotment Act, governs the Rosebud Tribe. The Sioux are

governed by the 1889 Act, legislation enacted exclusively for them. The respondents represent that "[T]he text of Section 12 [of the Sioux 1889 Act] is identical with Section 5 of the General Allotment Act." (Resp. Br. 10.) Not so.

Section 12 of the Sioux 1889 Act does no more than make it lawful for the Secretary of the Interior to negotiate "for the purchase and release" of unallotted land with the tribe's consent, the "sums agreed to be paid by the United States as purchase money" to be credited in the Treasury to the tribe, "which purchase shall not be complete until ratified by Congress." Practically the same language is incorporated in one of the provisos of section 5 of the General Allotment Act. But Section 5 contained many other provisions.[4]

The respondents assert that section 5 contained no restriction on method of payment except that the terms be just and equitable. (Resp. Br. 19-20.) Apart from the fact that neither section 5 nor section 12 comes into play here, the respondents are wrong. Both section 5 and section 12 called for the Secretary to negotiate an outright sale and purchase for an agreed sum to be paid by the United States with the consent of the tribe, to be ratified by Congress. None of these specifics is present in the three Rosebud Acts. There was no "purchase and release", no tribal consent, no purchase price, no agreed sum "to be paid by the United States as purchase money"[5] and nothing for Congress to ratify. There is no

---

[4]In addition to the negotiating authority, section 5 imposed restraints on alienation; made applicable state law of descent and partition after patents issued; provided for patents to religious and educational societies occupying certain public lands; and provided for a preferential right of Indian employment. Act of February 8, 1887, c. 119, 24 Stat. 388, 389.

[5]The respondents concede that under the Rosebud statutes, "Homesteaders and not the Government were going to purchase and pay for the land." (Resp. Br. 55.)

room or basis for the respondents to stamp Rosebud with the *DeCoteau* mold.[6]

To the extent that the respondents compare *DeCoteau* and the Sioux 1889 Act (Resp. Br. 29-34) there is a parallel. In both there was present the required "clear" intent to terminate the reservation status. In *DeCoteau,* the intent is evidenced by the tribe's consent to an outright cession for an agreed sum certain. In the Sioux 1889 Act, the intent is evidenced by the Sioux consent to setting up six separate reservations and consent to the provision that expressly "restored to the public domain" the opened land outside of the six reservations. Act of March 2, 1889, c. 405, sec. 21, 25 Stat. 888. See *Mattz v. Arnett,* 412 U.S. 481, 504, n. 22 (1973). The comparison respondents make serves no purpose except to point up the contrast between *Rosebud* and *DeCoteau.*

V.

Operative language

The respondents assert that "[t]the strongest indication of congressional intent to be found within the four corners of the 1904 Act is the operative language of the Act," referring to the language of cession in the 1901 unratified agreement. (Resp. Br. 65.) The respondents declare that "Congress could hardly have adopted a stronger statement of its intention." (Resp. Br. 65.) What the respondents fail to point out is that the language of cession appears in Article I of the 1901 agreement

[6]Here again the respondents refuse to deal with the statute as written. Thus, the respondents omit from the excerpt from section 5 selected for their brief (p. 20) the opening words of the sentence from which their excerpt is lifted reading: "*And the sums agreed to be paid by the United States as* purchase money for any portion of such reservation shall be held in the Treasury * * *." The words respondents omit are underscored.

to which a three-fourths majority of the male adult Indians consented in writing, but which Congress rejected. (Pet. Br. 7.) Also, the respondents fail to state that the entire 1901 agreement is set out as a preamble preceding the enactment clause of the 1904 Act. To the respondents, the material that precedes the enacting clause is the "operative language." Further the respondents do not tell the Court that in the operative provisions following the enacting clause, Congress repudiated, it did not adopt or ratify the 1901 agreement with its language of cession. (Pet. Br. 35; the 1904 Act is set out at pages 1a-6a of the appendix to the Tribe's opening brief.)

None of the three Rosebud acts contain language of cession. Nor could they. A cession is a sale, a bilateral transaction. (Pet. Br. 29-32.) All three statutes did no more than unilaterally open the unallotted land for sale with the proceeds credited to the Tribe.

VI.

Reserved land

The Tribe pointed to the inconsistency of construing the Rosebud statutes so as to simultaneously terminate the reservation and reserve tribal land for agency, Indian school and religious purposes, and, in the 1910 Act, to reserve the timberland to the Tribe. (Pet. Br. 46.) The respondent answers that such action was "in no way inconsistent with disestablishment," saying that similar provisions were present in *DeCoteau.* (Resp. Br. 97.)

Not so. No land was reserved to the tribe in *DeCoteau.* All tribal land was ceded. There the statute conferred on outside societies a preferential right to purchase the land they occupied for religious and educational purposes. (Pet. Br. 46.) With respect to the timber lands that the

1910 Rosebud Act reserved to the Tribe, the respondent answers with an excerpt from the House debates on the bill that became the Rosebud 1910 Act, where South Dakota Congressman Burke stated (45 Cong. Rec. 5471, April 27, 1910): Resp. Br. 98.):

> "* * * As a matter of fact, on this particular reservation there is not a single stick of timber, but the department seems to think the timber ought to be conserved, and so we put this language in the bill."

The Senate Committee report on the same bill spoke quite differently. The report recited (S. Rept. No. 68, 61st Cong., 2d sess. p. 3 (1910) (III App. 1240)):

> "It appears there is a very limited amount of timber upon that part of the reservation proposed to be opened, and the Indians were most solicitous that they should be protected and the timber reservation for their use. It is thought by your committee that this request by the Indians is just and reasonable and that the timber lands should be classified without regard to acreage and that they should be reserved for the use of the Indians."

Obviously, Congress would not have reserved timberland to the Tribe if it intended to terminate the reservation.

VII.

The United States did not guarantee payment for opened lands not sold

In Section 21 of the Sioux 1889 Act, the United States entered into a bilateral agreement with the Sioux to buy for fifty cents per acre all lands undisposed of after 10 years. The respondents point to that provision and misleadingly convey the impression that the equivalent thing was done in the three Rosebud Acts, and thus the

tribal interest in all the land was certain to be extinguished with payment. (Resp. Br. 69; 85-86; 98.)

Of course, the United States did not undertake to buy any land from the Rosebud Tribe, or to guarantee payment for lands not sold. Such a provision would have been at war with the last section of each Rosebud statute (pp. 2-3 *supra*), and the conflict would have surfaced long ago. The Rosebud statutes simply prescribed that all lands undisposed of after they were offered for sale for a specific period would ultimately be offered for sale for cash presumably to the highest bidder. (1904 Act. sec. 2, Pet. Br. App. 5a; 1907 Act, sec. 3, Pet. Br. App. 8a; 1910 Act, sec. 6, Pet. Br. App. 12a.) Contrary to the respondents, the United States did not agree to purchase those lands in violation of the last section of each Rosebud statute and did not purchase them. In fact, the undisposed of lands were withdrawn from sale in 1934 and later restored to the Tribe. (Pet. Br. 70.)

VIII.

Subsequent legislation

To determine the intent of Congress the respondents rely on legislation and other materials subsequent to the Rosebud statutes employing the phrase "former Rosebud reservation" or the like. (Resp. Br. 105-115.) Even subsequent legislation that is consistently the same and deals with the same subject and purpose as the prior statute is of doubtful value. (Pet. Br. 64.) Here the statutes on which respondents rely are not concerned with Indian problems. Their purpose was to grant the settlers additional time in which to make payments, or to transfer title to certain lands. They stem from the General Land Office not the Bureau of Indian Affairs. In those statutes Congress was not focusing on the

boundaries of the reservation, or tribal versus State jurisdiction. The statutes simply have no relation to the function of the Rosebud Acts. For that reason language that is no more than a form of identification may not be employed to construe the meaning of the Rosebud statutes. *Erlenbaugh v. United States,* 409 U.S. 239, 243-244 (1972); *Tooahnippah v. Hickel,* 397 U.S. 598, 606-607 (1970).

Moreover, even within respondents' context, the statutes are not consistent. The respondents selected only those items that fit their contention. They bypassed similar statutes and material that do not use the word "former", or the like, but simply refer to the Rosebud Indian Reservation. Such examples appear in Pet. Br. 63-64 and in the brief *amicus* of the United States at pages 46-51, as well as in the administrative material at pages 28-46.

IX

Some of Respondents unsubstantiated statements

The respondents' brief (pp. 135-142) also paints a false picture. The respondents intermix broad exaggerations with unsubstantiated claims and bland assertions contary to fact. None of respondents' brief-filler has any bearing on whether Rosebud is a reservation. Such unsupported statements have no place in the determination of the case and presumably are advanced as false coloring to camouflage the lack of substantive answers. Should the Court deem any such material in any way relevant to the issue, the Court is respectfully referred to the appendix at pages 1b-3b, *infra,* where the Tribe has responded.

The entire tone of the last portion of respondents' brief gives cause for grave concern as to the treatment

Indians might expect from the respondents' nontribal police, jailers, and courts. This Court was right when it said that "Because of local ill feeling, the people of the States where they [the Indians] are found are often their deadliest enemies". *United States v. Kagama,* 118 U.S. 375, 384 (1886). Unfortunately that observation in large measure still holds true.

CONCLUSION

The judgment of the court of appeals should be reversed with directions to enter a judgment declaring that no part of the Rosebud Reservation, as delimited in the 1889 Act, has been terminated or extinguished.

Respectfully submitted,

MARVIN J. SONOSKY
2030 M Street, N.W.
Washington, D.C. 20036
Attorney for the Petitioner.

APPENDIX

APPENDIX A

Excerpts From Rosebud Sioux Code of Justice

Chapter 1

Court and Procedure

Section 1. *Jurisdiction.*

The Rosebud Sioux Tribal Court of the Rosebud Reservation shall have jurisdiction over all offenses when committed by any person within the jurisdiction of the Rosebud Sioux Tribe, as described by the Act of March 2, 1889.

* * *

Chapter 2

Civil Actions

Section 1. *Jurisdiction.*

The Rosebud Sioux Tribal Court shall have jurisdiction over all suits wherein the defendant is a resident within the Rosebud Sioux Indian Reservation boundaries as established by the Act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

* * *

Chapter 6

Removal of Non-Members

* * *

Section 2 *Removal of Non-Members.*

Any person who is not a member of the Rosebud Sioux Tribe, who commits a crime under the Federal or tribal

laws (or a social act which is deemed by the Rosebud Sioux Tribal Court to have been committed by a person of undesirable character) may be forcibly removed from the Rosebud Sioux Indian Reservation by any officer of the Bureau of Indian Affair or the Rosebud Sioux Tribal Police force by delivering him or her to the nearest reservation boundary with a lawful order of the Court which orders the said person not to return to the Rosebud Sioux Indian Reservation; provided, that any non-Indian or nonmember of the tribe shall be afforded due process of law prior to the issuance of such a Court Order.

This Section was amended by Ordinance RB 74-06 on April 30, 1974.

* * *

APPENDIX B

Response to certain unsubstantiated charges in Respondents' Brief pages 135-142.

A. The undersigned was General Counsel for this Tribe through the years 1956-1969. The respondents, without support or documentation, charge that I advised the Tribe to reject a petition for nomination for tribal office on the ground that residence in Tripp County was not residence on the reservation. (Resp. Br. 136.) That statement is false. At all times during my tenure as General Counsel, the boundaries of the reservation were deemed those fixed by the 1889 Act as recited in Article I of the Tribe's Constitution (App. III, 1394; for full text see United States brief *amicus,* App. B, pp. 6a-22a). The membership of the Tribal Council, then and now, included representatives from the communities located in the full reservation including the areas opened by the three Rosebud Acts. (*Idem,* Article III of the Constitution.)

B. Respondents' bland, unsubstantiated statements that members of the Tribe living on fee land in the three opened counties "have consistently been refused" certain benefits (Resp. Br. 136) and that "for all practical purposes all of the area affected by the three Rosebud Acts has been treated since the Acts as being outside the Rosebud Reservation" (Resp. Br. 127), and like statements sprinkled elsewhere in the brief, are absolutely contrary to fact. (Pet. Br. 65-66; United States brief *amicus,*, pp. 28-51.) In particular, contrary to the respondents (Resp. Br. 136-137), the Tribe has constructed housing units in Ideal (Tripp County) and Bull Creek (Tripp County) administered by the Rosebud Housing Authority.

C. The respondents make the unfounded declaration that until recently the Tribe "always" treated the opened area as outside the reservation, and that tribal powers have not been exercised in the area for 65 years. (Resp. Br. 138.)

The opposite is true. The Tribe has consistently exercised jurisdiction over Indians on all parts of the reservation and the Bureau of Indian Affairs has administered the entire area as an Indian reservation. Indians living in the opened areas were reservation Indians as much as Indians living in Todd County. That was true contemporaneously with the three Rosebud Acts and it is true now. (Pet. Br. 65-66; Brief *amicus* for the United States, 28-38; Brief *amici* for the Association on American Indian Affairs and others, 28-39.)

D. The respondents have no license to employ the phrase "resurrection of original boundaries." (Br. 139 and elsewhere.) Such false coloring contributes nothing. In that connection the respondents, inappropriately, slip in a quotation from a television interview with the Chief Judge of the United States District Court for the District of South Dakota. Obviously, respondents' game plan is to convey the impression, with the imprimatur of a Federal Judge, that law and order on Rosebud is in a state of chaos.

In a conversation with Chief Judge Nichol concerning the respondents' quotation, Judge Nichol authorized the undersigned to state that the quoted excerpt was directed to the need for an additional judge and nothing more. Judge Nichol was addressing himself to the increased case load in his court "both civil and criminal". He mentioned Rosebud with the largest filing of criminal cases. The increase in the dockets of most federal district courts is common knowledge. Whatever the causes for the

increased burden in South Dakota, none supply a reason for destroying the reservation status and turning the Indians over to the State.

E. The respondents pretend alarm because under the Rosebud Code of Justice, the Tribal Court has jurisdiction over all persons on the reservation and the Tribe has an ordinance providing that, under order of the Tribal Court, any nonmember of the Tribe "who commits a crime under Federal or tribal laws (or a social act which is deemed by the Rosebud Sioux Tribal Court to have been committed by a person of undesirable character) may be forcibly removed from the Rosebud Sioux Indian Reservation * * *." See Appendix A; again the respondents inaccurately quote by substituting "socially undesirable" for "a social act". (Resp. Br. 139.)

The law is clear that Indian tribes have the power to exclude non-members from the reservation where authorized by treaty. *Federal Indian Law*, pp. 438-439 (GPO 1958). The necessary treaty language is in Article 2 of the Sioux Treaty of 1868, guaranteeing "absolute and undisturbed use and occupation", and forbidding any persons, except the Federal officers authorized by the treaty, from entering on the reservation. (See Pet. Br. 4; also, *Dodge v. Nakai*, 298 F. Supp. 26, 29 (D. Ariz. 1969).) If the exercise of the power of removal is unlawful, the matter is for the courts or Congress.

The question of whether tribes have jurisdiction over nonIndians on the reservation is now before this Court on petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit in *Oliphant v. Suquamish Indian Tribe*, No. 76-5729, October Term 1976. In that case the court of appeals held that the tribe did have jurisdiction over an offense by a nonIndian against an Indian on tribal trust land on the reservation. The fact

that the Rosebud Tribe is exercising a power that has been sustained by the Ninth Circuit is not a reason for terminating the reservation status.

F. The respondents make the claim that no harm would come if the Rosebud Reservation were limited to Todd County saying that *Morton v. Ruiz,* 415 U.S. 199 (1973), "expanded the Tribe's geographical area in terms of provision of services and benefits although not with respect to jurisdiction and authority" (Resp. Br. 140). *Morton v. Ruiz* held that the Bureau of Indian Affairs is obligated to administer the benefits of the Snyder Act (25 U.S.C. 13) to Indians who live "near" as well as those who lived "on" reservations. *Morton v. Ruiz* does not have any connection with the boundaries of the Rosebud Reservation as established by Congress, nor obviously does it expand the Tribe's geographical area for any purpose. Indians on the open areas reside from 35 to 140 miles from tribal headquarters in Todd County. If Todd County constituted the reservation, it is doubtful whether those Indians live "near" the reservation.